Supreme Court, U.S.
FILED
JUN 12 1997
OFFICE OF THE CLERK

No. 96-1815

In The

Supreme Court of the United States

October Term, 1996

JOHNIE VOLLERT,

Petitioner,

v.

CITY OF HOUSTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. FISHER
Senior Assistant City Attorney
P.O. Box 1562
Houston, Texas 77251-1562
(713) 247-2000
Counsel of Record for Respondent

Of Counsel:
GENE L. LOCKE
City Attorney
Member of the Texas Bar

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN HOLDING THAT THE POLICE DEPARTMENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS OUTWEIGHS VOLLERT'S RIGHT TO DISTRIBUTE TO CO-WORKERS RACIALLY INSULTING INVITATIONS TO A POLICE DEPARTMENT SPONSORED CEREMONY?

PARTIES TO THE PROCEEDING

JOHNIE VOLLERT – Petitioner, a present employee of the City of Houston.

THE CITY OF HOUSTON, TEXAS – Respondent, a municipal corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

ARGUMENT 2

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN HOLDING THAT THE POLICE DEPARTMENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS OUTWEIGHS VOLLERT'S RIGHT TO DISTRIBUTE TO CO-WORKERS RACIALLY INSULTING INVITATIONS TO A POLICE DEPARTMENT SPONSORED CEREMONY 1

A. Petitioner's Speech Threatened To Disrupt And Impede The Harmony Of The Houston Police Department (HPD). 3

B. The Time, Place, And Manner Of Petitioner's Speech Do Not Entitle It To A Higher Level Of Protection 6

II. RESPONDENT'S REPRIMAND TO PETITIONER WAS NOT ISSUED TO CHILL AND SUPPRESS PETITIONER'S SPEECH 9

III. PETITIONER'S INVITATION WAS NOT SPEECH ON A MATTER OF PUBLIC CONCERN 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Connick v. Myers, 461 U.S. 138 (1983)..... *passim*

Ex parte Curtis, 106 U.S. 371 (1882)..... 11

Kelly v. Johnson, 425 U.S. 238 (1976)..... 11

Pickering v. Board of Education, 391 U.S. 563 (1968)..... 4, 8, 10

Waters v. Churchill, 511 U.S. 661 (1994).....3, 5, 11, 12

STATEMENT OF THE CASE

While Petitioner's statement of the facts of the case (Petition at 2-7) is basically accurate, it contains a significant omission. Petitioner asserts that he "filed through the Civil Service Commission an appeal through arbitration. The arbitrator ruled against Petitioner." (Petition at 7). While this is correct, Petitioner fails to mention that the arbitrator ruled that the written reprimand had to be removed from Vollert's file three years from the date of its issuance if he received no additional disciplinary action during that time period. (Respondent's App. at 37).

REASONS FOR DENYING THE WRIT

Petitioner's argument is moot because the said reprimand has been removed from his file in compliance with the arbitrator's order. He can show no harm for its interim pendency. This case is not one meriting review by this Honorable Court. Petitioner has not established any of the consideration set forth in this Court's Rule 10. The decision rendered by the Court of Appeals is not in conflict with any other decision of another Court of Appeals or of this Court. This case presents no important legal issue that this Court has not decided but should decide.

ARGUMENT

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN HOLDING THAT THE POLICE DEPARTMENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS OUTWEIGHS VOLLERT'S RIGHT TO DISTRIBUTE TO CO-WORKERS RACIALLY INSULTING INVITATIONS TO A POLICE DEPARTMENT SPONSORED CEREMONY.

As stated in Vollert's own Petition, he had previously made a number of statements expressing his dissatisfaction with the *Edwards* consent decree. (Petition at 4). Vollert makes no claims regarding any punitive action taken against him for those statements. It was only after he "played the race card" that the Respondent considered his behavior to be detrimental enough to respond and to invoke the disciplinary process. It was the racially biased remarks by Vollert, a supervisor in the Houston Police Department (HPD), which led to an outcry by at least two minority officers, one of whom represented a large number of Hispanic officers employed by the department. (Respondent's App. at 39).

The Court of Appeals for the Fifth Circuit gave proper deference to the Respondent's right to maintain order and discipline within its police department when faced with a question of protected speech versus potential disruption in the work place. Upon weighing the importance of the speech in question,[1] it was clear that the Respondent's interests greatly outweighed Vollert's.

---

[1] At best a thoughtless attempt at humor, at worst an outright racial slur. (See Petitioner's App. 1)

Because the written reprimand was issued only for that portion of the speech that was disruptive, it is irrelevant whether the rest of the speech was protected. *Waters v. Churchill*, 511 U.S. 661 (1994).

The clear light of day reveals that Vollert's invitation was simply a backhanded slur against minority officers who were promoted pursuant to the *Edwards* consent decree and explained that *Vollert* (despite his race) achieved his deserved promotion while *they* (those minority officers who would "stand out" at the promotional ceremony) were undeserving of any congratulations.

This changed the character of Vollert's previous attacks from attacks upon policy to a personal attack upon a specific and identifiable group of his co-workers whom he labels as undeserving of their promotions. The fact that this group consisted only of minority members and that his invitation made specific reference to "his race" made this situation a subject of concern within the department. The reasoned, restrained response of a written reprimand to quell any potential disruption and further to place individuals on notice of the dangers inherent in such racially antagonistic actions was properly sustained by the trial court and the court of appeals.

A. Petitioner's Speech Threatened To Disrupt And Impede The Harmony Of The Houston Police Department (HPD).

Vollert based his petition on the premise that evidence on the record shows that there was no disruption within the HPD's rank and file. However, this Court has found that a showing of actual disruption was not

required in the balancing process and that the Respondent need not allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. *Connick v. Myers*, 461 U.S. 138 (1983). The District Court specifically found the Respondent's concerns regarding the potential effect of Vollert's racially biased invitation upon the close working relationships in the Police Department to be reasonable and that such concerns outweighed Vollert's interest in disseminating the racial commentary included in the invitation. (Petitioner's App. at 22)

This Court has instructed that lower courts must consider the state's interest in promoting the efficiency of the public services it provides through its employees. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Although the District Courts weigh a number of factors, the Fifth Circuit's inquiry centered on three: (1) was it likely to generate controversy and disruption; (2) did it impede the public agency's operations; and (3) did it affect working relationships necessary to the agency's proper functioning. (Petitioner's App. 15). "A stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public concern."[2] *Connick*, 461 U.S. at 152.

The basis for the Respondent's concern was that a racially biased invitation, attributable to Vollert, had been

---

[2] While the District Court did find that Vollert's speech was of public concern (Petitioner's App. at 10-13), Respondent asserts that racial jokes and slurs should be given little, if any, weight when balanced against the need for efficiency in a Police Department.

disseminated within HPD by some means. (Petitioner's App. at 1). Vollert's statements in this case were obviously not made in a vacuum but were made to coworkers, at least one of whom was offended by the racial aspects of the message. This Court has said that a "government employer may bar its employees from using offensive utterances to members of the public or to the people with whom they work." *Waters v. Churchill*, 511 U.S. at 672. The growing resentment in the department, as evidenced by the newspaper articles and formal and informal complaints regarding the invitation, was addressed by the issuance of a written reprimand to Vollert informing him that the racial aspects of his invitation were considered improper. (Petitioner's App. at 29-30, 36).

Even if the invitation was meant as a comment upon the *Edwards* decree, it remains true that Vollert was not disciplined for his professed displeasure with the consent decree but for the manner in which he raised this complaint. (Petitioner's App. at 29-30, 36). The objectionable racial overtones included in the invitation are clearly illustrated by the implied phrases "I will be getting promoted (**despite my race**) . . . " and "There will be a number of 'remedial' promotions from the **welfare list**, but they should stand out [because of their race] should you decide to congratulate only those [the whites] who deserve it." [Emphasis added]. This "speech" comprised a back-handed racial joke or slur given little or no protection by the First Amendment and properly discouraged by the Houston Police Department.

Finally, Vollert asserts "if prevention of further disruption was the real reason for disciplining Petitioner,

then the delay in administering the discipline, a four month time period between June 29, 1993 and October 8, 1993, did not further Respondent's purpose." (Petition at 13). While it is obvious that some time passed prior to the problem being brought to the attention of the Department, the Respondent would ask the Court to take judicial notice of Chapter 143 of the Texas Local Government Code which specifically lays out the procedures for an investigation and disciplinary action of a Houston Police Officer. (See, e.g. § 143.123). By its very nature, an Internal Affairs Division investigation into a complaint against a classified officer is a lengthy matter. Suffice it to say that a proper investigation of all aspects of the complaint against Vollert was required under state law and that the Department adhered to the law. (Respondent's App. at 5-7). This passage of time in fact clearly illustrates that the Respondent's action was not a knee-jerk reaction to Vollert's criticism of the *Edwards* consent decree as alleged by Vollert but rather it emphasizes the Respondent's focus upon the racial statements proffered by Vollert rather than the then stale commentary upon the *Edwards* decree.

B. The Time, Place, And Manner Of Petitioner's Speech Do Not Entitle It To A Higher Level Of Protection.

The District Court correctly held that the time, place, and manner of Petitioner's speech did not entitle it to a higher level of constitutional protection. Vollert himself released the "racial slur" genie and now attempts to extract damages from the Respondent for the action it was forced to take in an attempt to place it back into the

bottle. Vollert's assertion that he distributed the racially offensive material off-duty and that he meant the invitation as a comment upon the *Edwards* consent decree, fails to bestow upon the included slurs a higher level of protection. Because of the nature of the invitation[3] (racially offensive) and the individuals he chose to distribute it to (a number of union leaders, at least one of whom was a member of a minority group), it was painfully obvious that the message would not remain private nor did Vollert want it to remain so.

Vollert released an invitation which on its face is insulting and degrading to minorities and to other current police officers and co-workers. Vollert now attempts to cast all blame for his resulting reprimand upon Officer Perales, an original recipient of the invitation, who passed on the insulting comments to his peers. (Petition at 4-5, 15). From there the information was published in the OSSO (Organization of Spanish Speaking Officers) newsletter and eventually brought to the attention of the president of HPOA and the Chief of Police.[4]

While the initial time and place of the invitation appear to be separated from HPD, the manner in which

---

[3] Vollert's own witness described the invitation during the arbitration proceeding as satirical, without socially redeeming value, and not a serious contribution to public discussion of the *Edwards* lawsuit which at that time had already been settled. (Respondent's App. at 29.)

[4] It is unclear what "proper channels" Vollert asserts in his petition (at p. 5) that this information should have traveled to reach the Department, but no matter what method was chosen, the insulting wording of his invitation would have remained the same.

the speech was made clearly placed its subject matter into a conflict with Vollert's position as a sergeant in HPD. The individuals to whom the invitation was distributed may have been off duty at the time they received the information but it would be more than disingenuous for Vollert to suggest that his intention and belief were that such information could remain within the confines of the union hall and never make it to his workplace. These individuals were co-workers and leaders (board members) of a Houston Police Department employee group, all of whom were employed by HPD. (Petition at 3)

The degree of discretion afforded to the government for management of its internal affairs and personnel decisions vary with the nature of the employee's duties and the legitimate needs of the government. *Pickering v. Board of Education*, 391 U.S. 563 (1968). In this case, the Respondent's interest in maintaining efficiency in its operations outweighs Vollert's right to make racially degrading comments to his co-workers regarding his peers. *Connick v. Myers*, 461 U.S. at 142. There is wide degree of discretion afforded to government in management of its internal affairs, as noted in *Connick* and *Pickering*, along with the increased need for harmony and close working relationships in a police department. These concerns provide sufficient grounds for the department's determination that the use of racial jokes by a supervisor would adversely affect departmental efficiency, and validate the Respondent's attempt to remedy the situation by the issuance of a written reprimand to Vollert.

Finally, Vollert asserts that his speech did not impede his ability to perform his duties. However, an employer need not demonstrate that the employee's speech did

impede him from performing his job responsibilities. *Connick*, 461 U.S. at 151-152. It is undisputed that, as a police sergeant, Vollert works closely with minority officers. Indeed, he could be assigned to work for one of the Lieutenants who received a "welfare" promotion. In disciplining Vollert, HPD relied on its experience that a sergeant's use of racial jokes causes fellow officers to lose respect for the sergeant, which will necessarily effect the efficient and effective operation of the police department.

II. RESPONDENT'S REPRIMAND TO PETITIONER WAS NOT ISSUED TO CHILL AND SUPPRESS PETITIONER'S SPEECH.

It must be noted that Vollert's invitation contained no personal criticism of the Police Chief. Vollert's invitation was at best a satirical comment upon the promotions under the *Edwards* decree bolstered by racially derogatory comments. These racially biased comments were the sole subject of his written reprimand.[5] While Vollert hypothesizes that the written reprimand was but a part of a diabolic plot to deprive him of his right to comment upon the *Edwards* decree, he simply has provided no evidence of such intent anywhere in the record. In fact, by his own admission, he had made a number of previous verbal attacks upon the decree and yet he raised no allegation of an attempt to chill his speech *until* he laced his criticisms with racially offensive references. It is clear that the basis for the written reprimand is exactly what the reprimand

---

[5] The entire text of the Police Chief's written reprimand is quoted in Respondent's Appendix, at p. 5.

indicates on its face: Vollert's racially derogatory statements.

III. PETITIONER'S INVITATION WAS NOT SPEECH ON A MATTER OF PUBLIC CONCERN.

This Court has affirmed the concept that a state's interest in promoting the efficiency of public services must be considered when determining whether employee speech regarding a matter of public concern is protected. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). To determine a state's interest, the following factors should be considered:

> (1) the degree to which the employee's protected activity involved a matter of public concern, and the gravity of that concern,
>
> (2) whether close working relationships are essential to fulfilling the responsibilities of the public office and the extent to which the employee's protected activities may have affected those relationships,
>
> (3) the time, place and manner of the employee's activities, and
>
> (4) the context in which the employee's activities were carried out.

Connick v. Myers, 461 U.S. at 142 (1983).

To be protected, a government employee's speech must be on a matter of public concern, and the employee's interest in expressing himself on the matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in

promoting the efficiency of the public services it performs through its employees." *Waters v. Churchill*, 511 U.S. at 668, quoting *Connick v. Myers*, 461 U.S. 142 (1983). The fact that the potential disruption in this case was within the Respondent's Police Department lends even greater weight to the concerns regarding prevention of potential disruptions. If the "speech" were on a matter of public concern, because the Respondent reasonably believed that the manner in which Vollert expressed his invitation had the potential for disrupting the efficiency of HPD,[6] the resulting written reprimand (a minimal form of discipline) was necessary and proper under the First Amendment. The Respondent must have some power to attempt to restrain behavior that detracts from its effective operation. *Waters v. Churchill*, 511 U.S. at 675.[7]

The government has a legitimate interest in maintaining proper discipline in the public service, to the end that its duties may be discharged with efficiency and integrity. *Connick*, 461 U.S. at 150-151, quoting *Ex parte Curtis*, 106 U.S. at 373. Vollert's invitation was considered to be potentially disruptive to the efficient operation of HPD. The courts have consistently given substantial weight to government employer's reasonable predictions of disruption, even when the speech involves a matter of public concern. *Waters v. Churchill*, 511 U.S. at 673. "When close

---

[6] Petitioner's App. at 19.

[7] It must also be noted that Vollert has not challenged as unconstitutional HPD rules he was accused of violating and for which he was reprimanded. A Police Department is entitled to deference to its rules of conduct for its officers; it may apply a rule to an officer that could not be applied to a citizen. *Kelly v. Johnson*, 425 U.S. 238, 249 (1976).

working relationships are essential to fulfilling public responsibilities a wide degree of deference to the employer's judgment is appropriate." *Connick v. Myers,* 461 U.S. at 151-152.

Even if Vollert's intent was to comment upon a matter of public concern, it is insufficient to provide constitutional protection to **all** of his statements in the invitation. So long as the written reprimand was issued only for the part of the speech that was either not on a matter of public concern or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was protected. *Waters v. Churchill,* 511 U. S. at 681. The written reprimand itself clearly indicates that the conduct being addressed was only the racial remarks included in the invitation and did not concern any attempt by Vollert to comment generally upon the *Edwards* consent decree. (Petitioner's App. at 29-30, 36). Vollert's attempt to intermingle his racial remarks with his intent to comment upon the *Edwards* decree fails to lend protection to those comments because an employee's unprotected statement is not immunized from discipline even when surrounded by protected statements. *Waters v. Churchill,* 511 U. S. at 681. Therefore, as a matter of law, the "speech" that was the object of the discipline was not protected by the First Amendment and the Court of Appeals' judgment should be affirmed.

CONCLUSION

This case presents no significant legal issue. The court below correctly applied this Honorable Court's teachings on free speech and its limits within an employment context. Petitioner offers no unique question of law for review. From the foregoing argument, it is clear that Petitioner's contention is merely wrong.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN E. FISHER
Senior Assistant City Attorney
City of Houston Legal Department
P.O. Box 1562
Houston, Texas 77251-1562
(713) 247-2000

Counsel of Record for Respondent

Of Counsel:
GENE L. LOCKE
City Attorney
Member of the Texas Bar